

86-2065_{No.}

Supreme Court, U.S.
FILED

JUN 26 1987

JOSEPH E. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

ROBERT L. BROOKS, PETITIONER

vs

EBONY OIL CORPORATION, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Second Circuit

Robert L. Brooks,
Petitioner, Pro se
187 - 22 Rome Drive
St. Albans, N. Y., 11412
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EDITOR'S NOTE

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QUESTIONS PRESENTED

1. Whether the requirements of action "under color of state law" to establish a right to recover under Title 42, U.S.C., Section 1983 were met by Plaintiff's Complaint, as filed, where:

a. Jurisdiction of Federal District Court was invoked pursuant to Title 28, U.S.C., Section 1331, and Title 42, U.S.C., Section 1983;

b. The conduct of the Defendant, acting "under the color of state law", constituted a "State Actor"; and

c. As "State Actor" submitted a "bogus order" for Inquest; and

d. Obtained, by fraud that was never denied, an Inquest money judgment;

e. With State officers act-



ing jointly with the "State Actor"
in garnishment, and are enriched
under the "color of state law"?

2. Are the Judiciary and Judicial
Procedure, the Federal Rules of Civil
Procedure, and the Federal Rules of
Evidence, as used in this case, arbitrary?

3. Whether United States Court of
Appeals for the Second Circuit action, on
appeal, substantially diminished or
destroyed the value of Rule 16, Pre-trial
order, of Federal Rules of Civil Procedure?



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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

No. _____

ROBERT L. BROOKS, Petitioner

vs

EBONY OIL CORPORATION, Respondent

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
for the Second Circuit

Petitioner, Robert L. Brooks, prays
that a writ of certiorari issue to review
the judgment of the United States Court
of Appeals for the Second Circuit
entered on the 2nd day of April, 1987,
affirming the judgment of the District
Court in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra*, 1a-3a) is not reported. The opinion of the District Court, dated September 29, 1986 (App. B, *Infra*, 4a-8a) is not reported. The opinion of District Court (App. C, *infra*, 9a) dated November 21, 1986, is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 2, 1987. A motion to Amend was denied on November 21, 1986 (App. C, *infra*, 9a). The jurisdiction of this Court is invoked under, Title 28, U.S.C., Section 1254(1).

CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part:

"No person shall * * * be deprived of life, liberty or property, without due process of law * * * ".

2. The Consumer Credit Protection Act, Title 15, U.S.C., Section 1672(c), provides for "definitions" as follows:

"(c) The term 'garnishment' means any legal or equitable procedure through which the earning of any individual are required to be withheld for payment of any debt".

Section 1692(e)(2)(A), provides:

"(2) The false representation of--
(A) the character, amount or legal status of any debt;"

3. Federal Question, reenacted by
Pub. L. 96-486, Section 2(a), Stat. 2369,

" The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.".

4. Title 42, U.S.C., Section
1983, Civil action for deprivation of
rights, provided:

" Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.".



Federal Rules of Civil Procedure,
Rules 16, Pre-Trial Procedure; Formulating
Issues, provided in part:

" . The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided, and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions".



STATEMENT

This case originated in the United States District Court for the Eastern District of New York, on January 29, 1986, in an action that arises under Title 42, U.S.C., Section 1983, with jurisdiction of Federal District Court founded on that section and on Title 28 U.S.C, Section 1331. A Complaint was served and Answered and referred, by Judge Platt, by Standard Referral Order, to Magistrate Chrein to, inter alia: "To enter the scheduling order provided for in F.R.Civ. P. 16(b)".

The final Pre-Trial Conference was held on June 4, 1986, that resulted in Magistrate Chrein's Conference Memorandum and Order, that "Dispositive motions are to be filed no later than July 7, 1986". Defendant's motion, dated July 18, 1986,

for Summary Judgment, praying for dismissal of the complaint.

Pursuant to Civil Conference Memorandum, dated June 4, 1986, Plaintiff's proposed Pre-trial Order was timely served on September 19, 1986, with a "courtesy copy" filed at court.

Memorandum and Order, dated September 29, 1986, stating that no Federal Question was raised under Section 1983, dismissed the Complaint. (App. B, 4a-8a). On motion for reconsideration, adhered to original decision in an Order dated, November 21, 1986 (App. C, infra, 9a).

Following the filing of Notice of Appeal to the United States Court of Appeals, Second Circuit, the Court affirmed the Order of District Court in the dismissal of the complaint.

REASONS FOR GRANTING THE PETITION

REASON # 1,

42 U.S.C., SECTION 1983

Article three, Section 2, Clause 1, makes provision for cases said to present a general federal question, by providing:

"The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made or which shall be made, under their Authority;"

Interpreting this language, Chief Justice Marshall, in Osborn v Bank of the United States (1824) 22 US (9 Wheat) 738, 6 LE 204, early gave Article three, Section 2, Clause 1, a broad jurisdiction for federal courts.

The Complaint (App. infra 10a-19a), filed in District Court, Eastern District of New York on January 29, 1986, Docket CV 0306, stated in paragraph #3:



" The action arises under Title 42, U.S.C., Section 1983. as hereinafter more fully appears. The jurisdiction of this court is founded on that section and on Title 28 U.S.C., Section 1331. . . "

In the complaint, it is alleged, that the defendant, as a "state actor". and "under the color of state law", aided by the state and garnishment maintained by the state, denied due process, pursuant to Title 42 U.S.C., Section 1983.

It is respectfully suggested that the United States Court of Appeals, for the Second Circuit, misread the complaint in affirming substantially the order of District Court, that cited the wrong Point of Law to the case at bar, Dahlberg v. Becker, 748 F.2d, 85. Point 3 and 4 as discussed in the Dahlberg case is more in Point to the case at bar, and states in part as follows:



"(3,4) In order to allege a good cause of action, plaintiff must charge first that the conduct complained of has deprived him of a constitutionally protested right, and second, that the conduct allegedly causing the deprivation was fairly attributable to the State. . . ."

This Court in Lugar v Edmondson Oil Co., Inc. 457 U.S., 922, held:

"Constitutional requirements of due process apply to garnishment and prejudgment attachment procedures whenever State officers act jointly with a private creditor in securing the property in dispute. Sniadach v Family Finance Corp., 395 U.S. 337. And if the challenged conduct of the creditor constitutes state action as delimited by this Court's prior decisions, then that conduct is also action under color of state law and will support a suit under Section 1983".

The complaint did charge that the defendant with acting as a "state actor" created and submitted a "bogus order" and was granted, by the state, an Inquest judgment which added a greater amount of



interest and is collecting from garnishment, under the control of the state, constituting "state action".

The opinion of the Court of Appeals for the Second Circuit in Dahlberg v Becker on the question of dismissal of a complaint, quoted at page 88, from Conley v. Gibson, 355 U. S. 41, 45-46, in part as follows:

" . . . a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief".

In Hullane v Central Hanover Trust Co., 339 U.S. 306, at 313 stated in part:

"The right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appeal or default, acquiesce or contest.



REASON # 2

PROCEDURE OF RULE 16(c)

Rule 16(c) of Federal Rules of Civil Procedure, states as follows:

" (c) PRETRIAL ORDERS. After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.".

The final pre-trial conference was held in United States District Court, Eastern District of New York for Civil Action # 86 CV 306, with agreement of the action taken; and the Scheduling Order Entered on June 6, 1986, that stated:

1. No discovery was requested by either party.
2. Dispositive motions are to be filed no later than July 7, 1986..

3. Proposed Pre-trial order, by the plaintiff, to be served upon the defendant by September 19, 1986.
4. Proposed Pre-trial order, by defendant, to be served upon the plaintiff, by October 3, 1986.
5. Proposed Pre-trial order to be prepared by both parties for the Court's signature and submitted by October 16, 1986.
6. If non-compliance with Scheduling Order, the parties are to meet with Judge Platt at 11:00 A.M. on Friday, October 17, 1986.

Defendant's motion, sworn to on July 18, 1986, should have been barred, as not timely served, pursuant to the Scheduling Order, entered after the final Pre-Trial Conference was held.

REASONS FOR GRANTING THE PETITION

REASON # 3

GARNISHMENT

The Second Cause of Action (App. D, 14a-19a) that was denied by the Court

of Appeals in Affirming the District Court's Order dismissing the Complaint; prayed for relief of garnishment, that violated due process.

In the October Term, 1968, Sniadach v. Family Finance Corp. 395 U.S., 337 at 342, the Opinion of the Court stated in part, as follows:

"Where the taking of one's property is so obvious, it needs no extended argument to conclude that absent notice and a prior hearing (cf Coe v Armour Fertilizer Works, 237 U. S. 413, 423) this prejudgment garnishment procedure violates the fundamental principles of due process.

The Opinion of this Court in Schroeder v. City of New York, 371 U.S., 202, stated in part as follows:

"There was no such allegations in the pleading, upon which the case was decided by the Inquest Court.
* * * * That the appellant had a right to be heard on a claim for compensation for damages * * * *

* * * information, which the city was constitutionally obliged to make, at least a good faith effort, to give personally to the defendant, an obligation which the mailing of a single letter would have discharged".

CONCLUSION

For all of the foregoing reasons, .. it is respectfully submitted that this Court grant this Petition for a Writ of Certiorari.

Dated: St. Albans, New York
June 15, 1987

Respectfully submitted

Robert L. Brooks
Petitioner, Pro se
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

ROBERT L. BROOKS, PETITIONER

VS

EBONY OIL CORPORATION, RESPONDENT

PETITIONER'S APPENDIX

To the United States Court of Appeals
for the Second Circuit

APPENDIX A (1a-3a)

UNITED STATES COURT OF APPEALS
Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 2nd day of April, one thousand nine hundred and eighty-seven.

Present:

HONORABLE WILFRED FEINBERG,
Chief Judge

HONORABLE THOMAS J. MESKILL,

HONORABLE FRANCIS X. ALTIMARI,
Circuit Judges.

-----x

ROBERT L. BROOKS,

Appellant,

- against - 86-9068

EBONY OIL CORPORATION,

Appellee.

-----x

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on



the transcript of record from the United States District Court for the Eastern District of New York, and was argued by appellant pro se and by counsel for appellee.

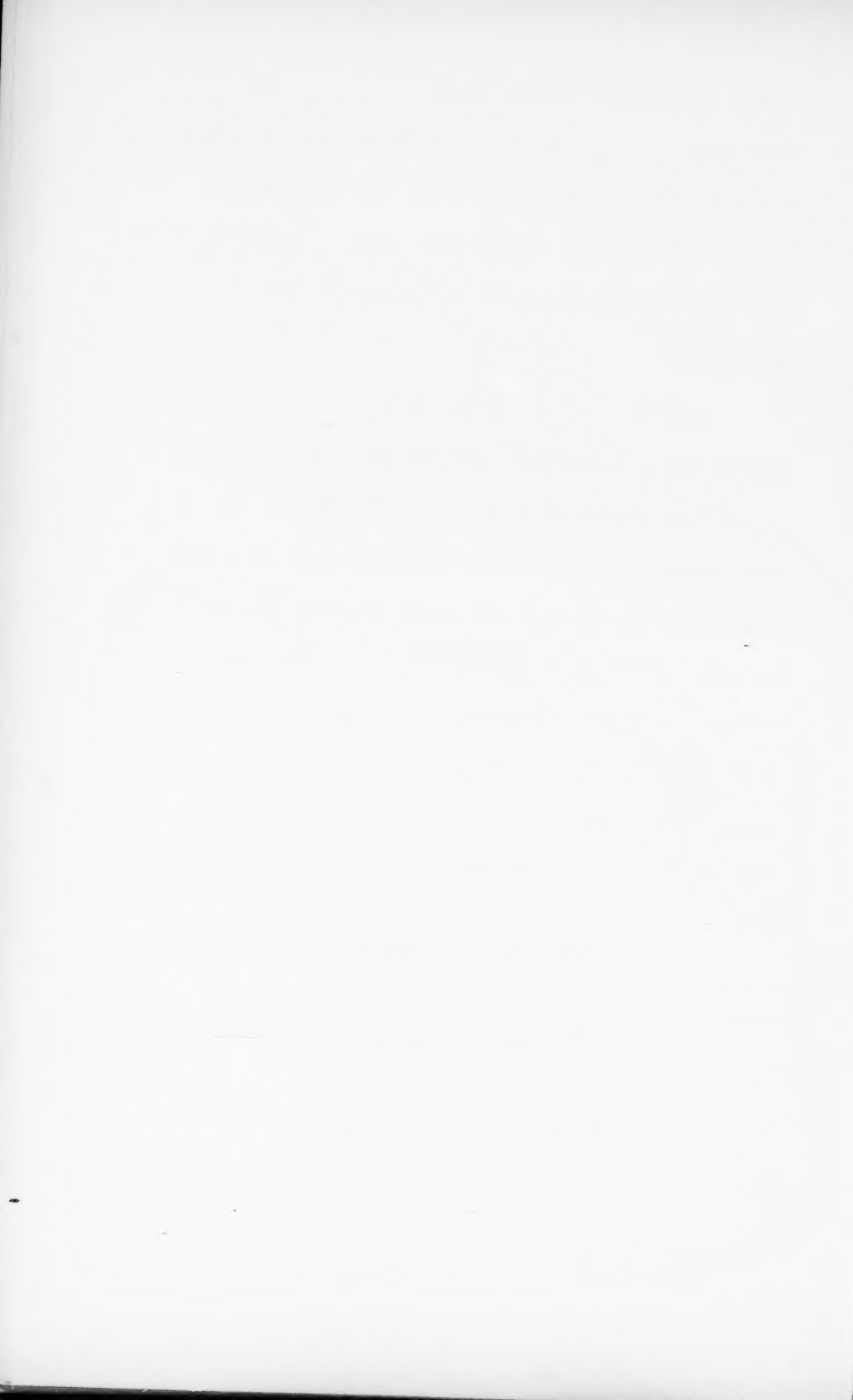
ON CONSIDERATION WHEREOF, IT IS NOW HEREBY ORDERED, ADJUDGED AND DECREED

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said district court is AFFIRMED substantially for the reasons stated in the opinion of Judge Thomas C. Platt, Jr., dated September 29, 1986. Appellee's request for attorney's fees and more than ordinary costs is denied.

s/
WILFRED FEINBERG, Chief Judge

s/
THOMAS J. MESKILL,

s/
FRANCIS X. ALTIMARI,
Circuit Judges.



N. B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x

ROBERT L. BROOKS,

86 CV 306

Plaintiff.

- against -

MEMORANDUM
AND
ORDER

EBONY OIL CORPORATION,

Defendant.

-----x

PLATT, D. J.

This action arises out of a 1976 contract to install an oil burner and boiler in plaintiff's private residence. In a previous action before this Court initiated in August 1985, plaintiff alleged that defendant had failed to perform under this contract in a "work-manlike manner" purportedly in violation of 42 U.S.C. Section 1983. On December 6, 1986, after oral argument, the undersigned dismissed plaintiff's complaint for lack of subject matter jurisdiction because the suit involved no State action



and thus presented no federal question pursuant to Section 1983.

In January 1986 plaintiff commenced the instant action alleging that defendant had acquired a State court judgment for payment under the above-mentioned contract by perpetrating a fraud on that Court. Plaintiff further alleges that defendant's use of the State's debt collection procedures was fraudulent, Plaintiff again asserts 42 U.S.C. Section 1983 as the basis for federal jurisdiction.¹

This Court is unable to ascertain any valid basis for the exercise of federal jurisdiction. Section 1983 states, in pertinent part:

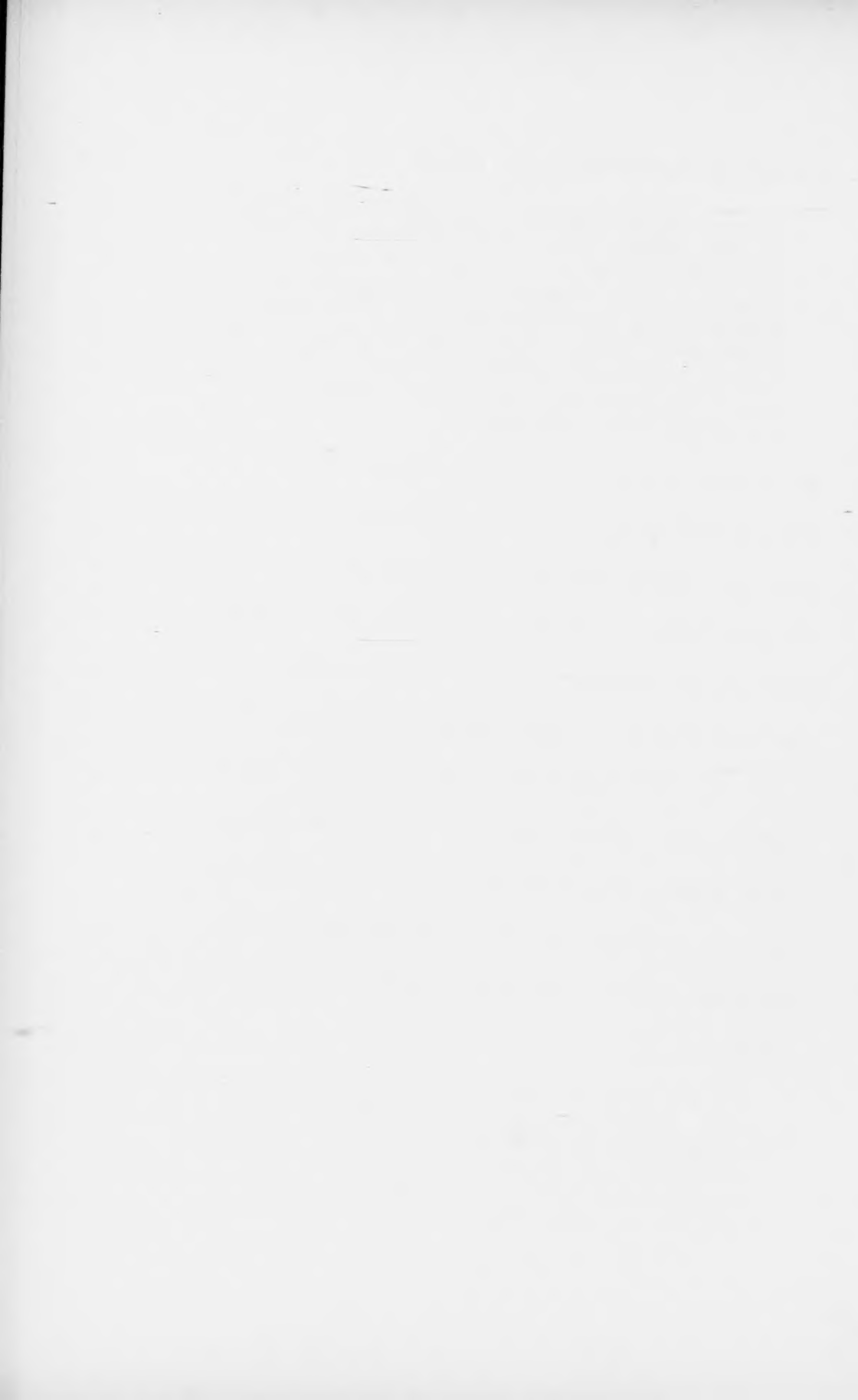
Every person who, under color of any statute, ordinance, custom, or usage, of any State or Territory or the Dis-
Id. at 90-91



district of Columbia, subjects or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

To state a claim under Section 1983 plaintiff must allege that the party charged with the deprivation of rights is one who is "a state official or someone whose conduct is otherwise chargeable to the State." Dahlberg v. Becker, 748 F.2d 85, 89 (2d Cir. 1984), cert. denied, 105 S. Ct. 1845 (1985). Private misuse of a State statute may not constitute "State action" within the meaning of Section 1983. As the Court in Dahlberg stated:

It is one thing to hold a State accountable for the unconstitutional acts of its legislature, but quite another to charge that State with responsibility where private parties abuse an otherwise valid state law.



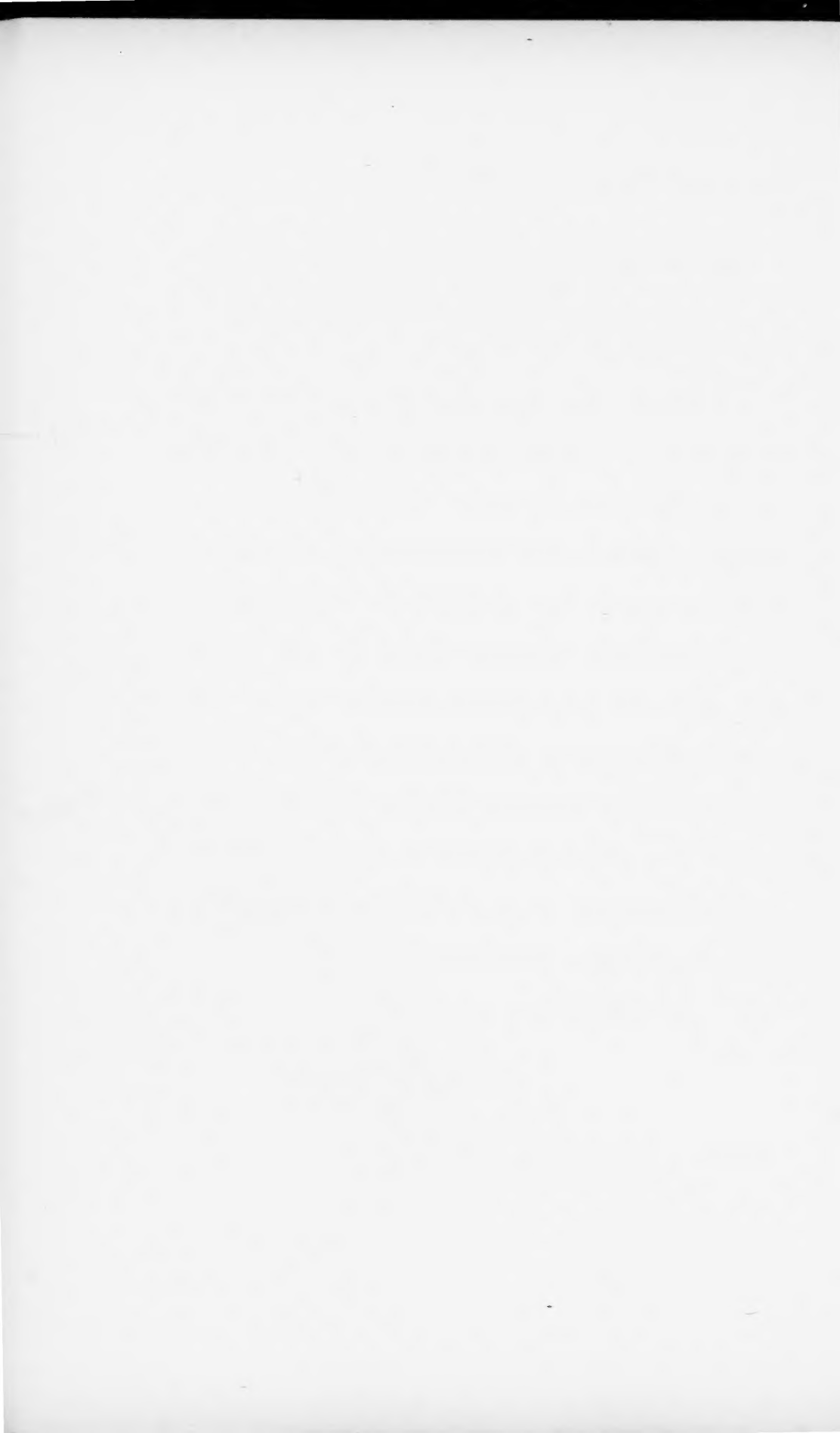
In the latter case, the State does not sanction such abuse, nor can it prevent it any more than it can stop a private party from committing a crime or a tort.

This rule applies equally to a private party' purported abuse of a State's valid judicial or debt collection procedures. Thus, any deprivation of plaintiff's rights as alleged in his complaint is not fairly attributable to the State and may not sustain an action under Section 1983. As no federal question is raised under Section 1983, there is no basis for the exercise of this Court's jurisdiction and plaintiff's complaint is accordingly dismissed.

SO ORDERED.

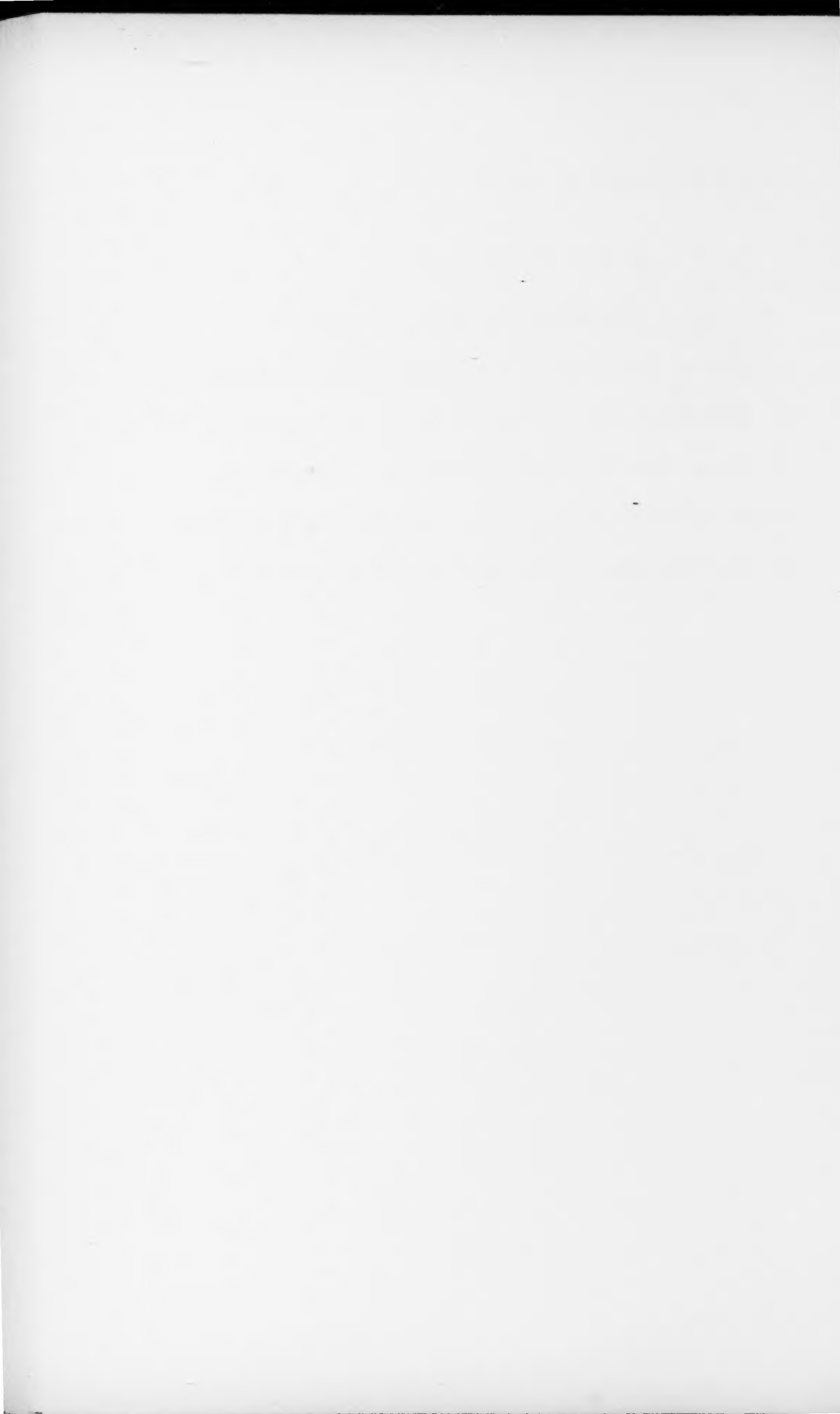
s/
(THOMAS C. PLATT)
U. S. D. J.

Dated: Brooklyn, New York
September 29, 1986



F O O T N O T E

1 Plaintiff's motion papers recite a multitude of federal statutes, in addition to Section 1983, in support of this Court's jurisdiction. However, those statutes bear no apparent relevance to the claims asserted in this action.



APPENDIX C

9a

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x

ROBERT L. BROOKS, 86 CV 306
 Plaintiff.

- against -

MEMORANDUM
AND
ORDER

EBONY OIL CORPORATION,
 Defendant.

-----x

PLATT, D. J.

Plaintiff moves for reconsideration of this Court's order dated September 29, 1986, dismissing his complaint for lack of subject matter jurisdiction. The motion to reconsider is granted. However, after reviewing the facts and the applicable law, we adhere to our original decision.

SO ORDERED.

s/

U. S. D. J.

Dated: Brooklyn, New York
November 21, 1986



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x

ROBERT L. BROOKS,

Plaintiff.

VERIFIED

- against -

COMPLAINT

EBONY OIL CORPORATION,

PLAINTIFF

DEMANDS

Defendant.

TRIAL BY

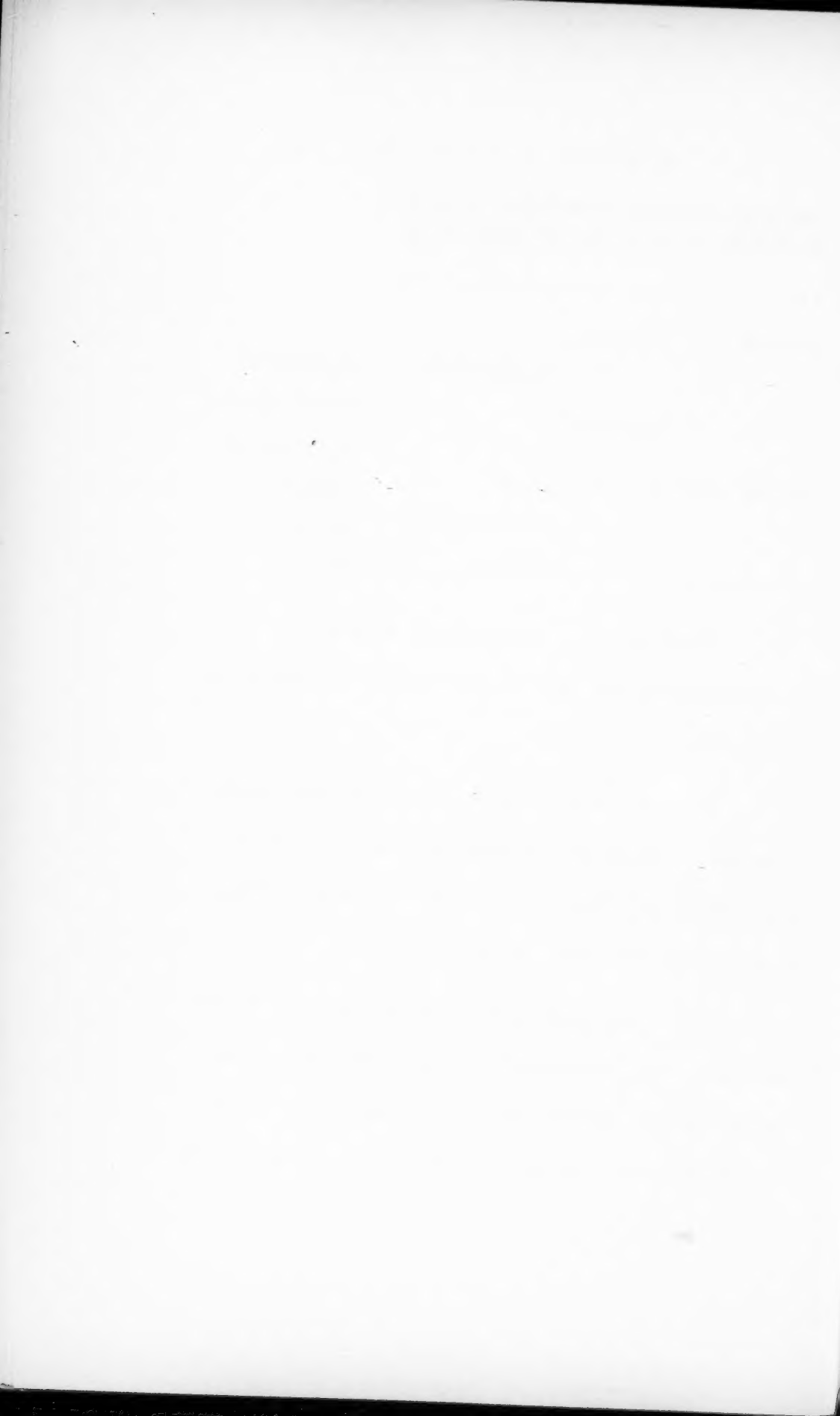
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JURY

Plaintiff, appearing Pro se,
complaining of the Defendant, alleges as
follows:

1. At all times hereinafter mentioned. Plaintiff was and still is a resident of the County of Queens, City and State of New York.

2. At all times hereinafter mentioned, on information and belief, the Defendant, EBONY OIL CORPORATION, is a corporation, incorporated under the laws



of New York State, and having a main office at 107-15 Merrick Boulevard, Jamaica, Queens, New York.

3. The action arises under Title 42, U.S.C. Section 1983, as hereinafter more fully appears. The jurisdiction of this court is founded on that section and on Title 28 U.S.C. Section 1331. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$10,000.00

AS AND FOR ITS FIRST CAUSE OF ACTION

4. That upon information and belief, on or about the 24th day of July, 1980, Defendant submitted to the Clerk of Special Term, Part I, Supreme Court, Queens County a "Bogus order to be entered in a pending case in the court.

5. That upon information and belief, a Memorandum Decision on Motion,



dated July 3, 1980, upon the briefs submitted by both sides, triable issues of law and fact that precluded the "Bogus" order, that was not dated, or any Justice of the court's name given in the order.

6. That upon information and belief, on or about 26th day of March, 1981, an Inquest was held, that awarded Ebony Oil Corporation a judgment in the sum of \$1,171, plus attorney's fees in the sum of \$234.20, together with interest of \$442.35, making a total of \$1,847.55.

7. That upon information and belief, only the attorney for Ebony Oil Corporation was present at the Inquest held on March 26, 1981, as reported by the Official Court Reporter's record of the Inquest.

8. That upon information and belief, no testimony was given by Lawrence



J. Cormier, as President of Ebony Oil Corporation, at the Inquest, as stated in the Judgment.

9. That upon information and belief, Ebony Oil Corporation knowingly obtained a judgment by Inquest from this Plaintiff by deceitful or unlawful means without due process.

10. That upon information and belief, the Defendant knew that the Inquest Judgment was based upon a "Bogus" order when submitted, and knew also that no lawful Inquest could be held under the "color of law", in violation of the protection "arising under Title 42 U.S.C. Section 1983" guarantee of Constitutional rights.

11. That as a consequence of the unjust, wrongful and malicious action of the Defendant in obtaining an Inquest



Judgment based upon fraud in the court of law, and caused this Plaintiff to be humiliated and embarrassed, and suffer mental anguish, and to incur substantial loss of time and monies seeking justice.

12. By reason of the foregoing, the Plaintiff has been damaged in the sum of Fifty Thousand (\$50,000.) Dollars.

AS ANT FOR ITS SECOND CAUSE OF ACTION

13. Plaintiff repeats, reiterates and realleges each and every allegation set forth and contained in paragraphs marked and numbered "1." through "12." herein, both inclusive, as if fully set forth at length herein.

14. By reason of the Inquest Judgment, by the Defendant against the Plaintiff, the Plaintiff has been caused to be humiliated and embarrassed, and suffer

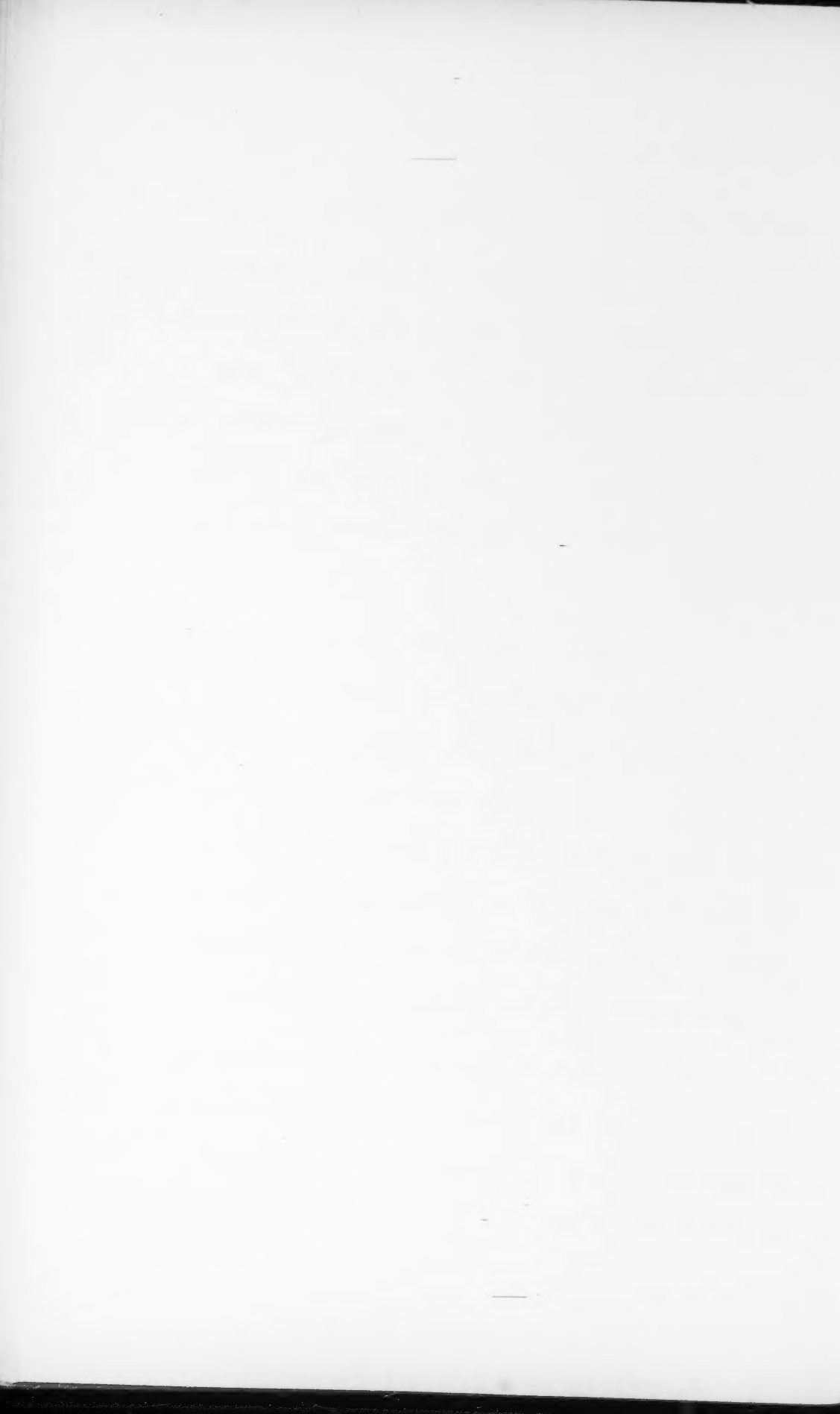
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mental anguish, under the "color of law".

15. That Plaintiff was advised by the attorney for Ebony Oil Corporation in a letter dated August 26, 1983, that :
" . . . (T)o avoid any futher problems or trouble or the sale of your house, I suggest that you call me and arrange to pay it off . . . ".

16. That Plaintiff was advised by the attorney for Ebony Oil Corporation in a letter dated March 6, 1984, stated in part: " . . . (U)nless you advise me that the notice of judgment you sent to me and the appeal is withdrawn, I shall have no other alternative but to pursue it and seek attorneys fees and costs . . . ".

17. That Plaintiff was advised by the attorney for Ebony Oil Corporation in a letter dated January 23, 1982, that stated in part: " . . . and I shall be



proceeding to marshal your assets, including your home. . . .".

18. That Plaintiff was served on or about the 18th day of July, 1985 with a Subpoina to Take Deposition of Judgment Debtor, to take a deposition under oath upon oral or written questions.

19. That upon information and belief, the Subpoena to take Deposition of a Judgment Debtor, was issued in bad faith by changing and adding the requirement of a Subpoena duces tecum, by demanding Plaintiff to bring accounts receivables, deeds, bankbooks and check books, both business and personal. All in violation of due process in a case before the Court of Appeal for the State of New York.

20. That there was not any action before any court on January 21, 1976; nor, any judgment entered on April 21,



1976, nor, any money due from those dates, and efforts to reopen the Inquest Judgment by the Plaintiff have failed.

21. That the interest of Four hundred forty-two and 35/100 (\$442.35) Dollars under the "color of law" violate due process.

22. That on or about 30th day of August, 1985, Plaintiff was served with an Income Execution by the Sheriff of the City of New York, D-Q # 11578, and incurred a deduction of ten percent of his weekly salary, by an Inquest Judgment, grant-under the "color of law" in violation of Title 42 U.S.C. Section 1983.

23. By reason of Defendant's fraudulent conduct, under the "color of law". as set forth above in this Second Cause of Action, the Plaintiff has sustained

damages in the sum of One Hundred Thousand (\$100,000.) Dollars.

WHEREFORE, Plaintiff demands judgment against the Defendant as follows:

1. On the First Cause of Action

a) Declaring that the Inquest Judgment entered for Cal. No. MM 3386, Index # 3713-79 on March 26, 1981 is fraudulent; and

b) Directing Ebony Oil Corporation to return all funds from Macy's Herald Square on Income Execution by the Sheriff of the City of New York, for E-Q # 11578, and

c) That a receiver be appointed by this Court to take charge of the aforesaid fund; and

d) Plaintiff demands judgment against the Defendant on the First Cause Action, in the sum of Fifty Thousand



(\$50,000.) Dollars.

2. On the Second Cause of Action

a) Plaintiff, Robert L. Brooks, repeats, reiterates and demands each and every demand contained in a), b), c) of the First Cause of Action; and

b) Demands judgment against the Defendant on the Second Cause of Action, in the sum of One Hundred Thousand (\$100,000.) Dollars.

s/

ROBERT L. BROOKS
187 - 22 Rome Drive
St. Albans, New York
11412
(718) LA 5 2787

Sworn to before
me on the day of
January, 1986



TITLE 15—COMMERCE AND TRADE**SUBCHAPTER II—RESTRICTIONS ON
GARNISHMENT****§ 1671. Congressional findings and declaration of purpose****(a) Disadvantages of garnishment**

The Congress finds:

(1) The unrestricted garnishment of compensation due for personal services encourages the making of predatory extensions of credit. Such extensions of credit divert money into excessive credit payments and thereby hinder the production and flow of goods in interstate commerce.

(2) The application of garnishment as a creditors' remedy frequently results in loss of employment by the debtor, and the resulting disruption of employment, production, and consumption constitutes a substantial burden on interstate commerce.

(3) The great disparities among the laws of the several States relating to garnishment have, in effect, destroyed the uniformity of the bankruptcy laws and frustrated the purposes thereof in many areas of the country.

(b) Necessity for regulation

On the basis of the findings stated in subsection (a) of this section, the Congress determines that the provisions of this subchapter are necessary and proper for the purpose of carrying into execution the powers of the Congress to regulate commerce and to establish uniform bankruptcy laws.

(Pub. L. 90-321, title III, § 301, May 29, 1968, 82 Stat. 163.)